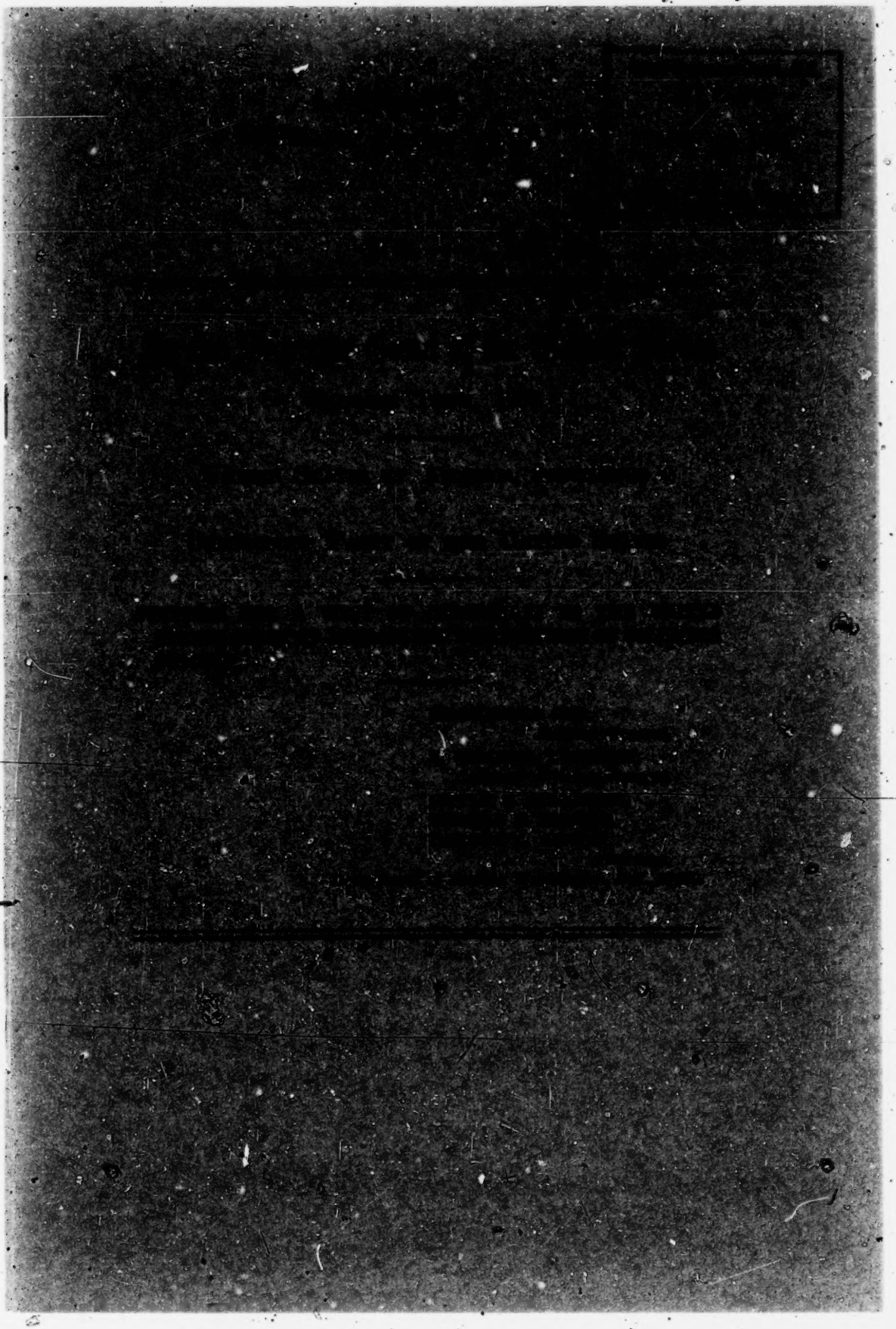

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

COMMUNIST PARTY OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above case.

OPINION BELOW

The opinion of the court of appeals (Appendix A, pp. 19–32 below) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1963 (Appendix A, p. 33 below). On February 21, 1964, the government's petition for rehearing *en banc* and respondent's petition for rehearing were denied. On March 21, 1964, the Chief

Justice extended the time for filing a petition for a writ of certiorari to and including April 21, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Communist Party, having been ordered to register as a Communist-action organization under the Subversive Activities Control Act, declined to do so on the basis of claims by its officers that such registration would violate their privilege against self-incrimination under the Fifth Amendment. The questions presented are:

1. Whether, under this Court's decision in *Wilson* v. *United States*, 221 U.S. 361, *United States* v. *White*, 322 U.S. 694, and *Baltimore and Ohio R.R.* v. *Interstate Commerce Commission*, 221 U.S. 612, the Party's officers may invoke their personal rights under the Fifth Amendment when called upon to register the Party in their official capacity.

2. Whether the Party's officers may, under the Fifth Amendment, refuse to register for the Party when they cannot possibly incriminate themselves because the statute prohibits any information obtained by registration from being introduced in evidence in a judicial proceeding and no new leads to other information can result since Party officers have publicly stated their positions.[1]

[1] Although *Scales* v. *United States*, 367 U.S. 203, 210–219, appears to establish that Section 4(f) does not bar the use of the registration statement to obtain leads and therefore does not in itself provide a sufficiently broad immunity to make the privilege inapplicable, the government reserves the right, if certiorari is granted and further research should indicate that Congress did intend to confer a broader immunity, so to argue.

3. Whether, even assuming that the Party's officers could invoke the Fifth Amendment, the Party had a duty either to register through attorneys or other agents who could not incriminate themselves or else to prove that no such agents were reasonably available.

STATUTE INVOLVED

The relevant provisions of the Subversive Activities Control Act of 1950 are set forth in Appendix B, pp. 34–36 below.

STATEMENT

On June 5, 1961, this Court affirmed the judgment of the court of appeals, upholding the order of the Subversive Activities Control Board that the Communist Party register with the Attorney General under the Subversive Activities Control Act of 1950, 50 U.S.C. 781, *et seq.* *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1. The order of the Board became final on October 20, 1961; and, under Section 7(c) of the Act (50 U.S.C. 786(c)(3)), the Party was required to register within 30 days after that date.

On November 17, 1961, the Department of Justice received a letter which stated in part: [a]

> This is to advise you that the officers of the undersigned, Communist Party of the United States, and of all of its subdivisions decline to sign, or to file or to authorize the signing or filing of, or to supply the information called for by a registration statement

[a] A copy of the letter appears opposite page 70 of the Joint Appendix in the court below.

(Form No. IS–51) or a registration form (Form No. IS–51a) for the undersigned or of any of its subdivisions. * * *

These declinations are made by each officer in the exercise of his privilege under the Fifth Amendment to the Constitution not to be a witness against himself. The officers have adopted this means of asserting their respective constitutional privileges because a claim of privilege made in the name of an officer would tend to incriminate him and might constitute a waiver of his privilege.

The letter was signed:

Yours truly,

COMMUNIST PARTY OF THE UNITED STATES
BY ITS AUTHORIZED OFFICERS.

In a telegram to the Communist Party, Assistant Attorney General Yeagley rejected the Party's purported right not to register (J.A. 72).

Respondent was indicted in the District Court for the District of Columbia on December 1, 1961. The first eleven counts each charged that, on 11 specified days beginning on November 20, 1961, the respondent "willfully and unlawfully" failed to register with the Attorney General.[2] Count 12 charged that respondent willfully and unlawfully failed to file with the Attorney General a registration statement (J.A. 1–7). After a jury trial, the respondent was convicted on all twelve counts and was fined $10,000 on each count, a total of $120,000.

The court of appeals reversed, holding that the

[2] The statute makes each day on which an organization fails to register a separate offense (Section 15(a)).

Party officers' invocation of their privilege against self-incrimination justified the Party's refusal to register. It distinguished this case from the cases in which this Court has held that officers of corporations, associations and other groups cannot refuse to produce organization records or submit organization reports which contain material that may incriminate them (see pp. 7–10 below), on the ground that the Communist Party is "*sui generis*" and "virtually * * * a criminal conspiracy per se" (App. A, pp. 25–26 below). The Court noted that the regulations permit the registration forms to be executed by a "member, employee, attorney, agent, or other person" (App. A, p. 28 below). It recognized that, if an officer of an organization which is required to act properly claims his privilege against self-incrimination as justification for his refusal to perform his duty for his organization, the latter must select someone else who will act for it. The court was unwilling to presume, however, that the Communist Party could find someone willing to act on its behalf; it ruled that the existence of a "volunteer" was an element of the offense which the government was required, but had failed, to prove.

The court of appeals remanded the case to the district court with instructions to grant a new trial, if the government should request it, for the purpose of presenting evidence that the respondent could have found a volunteer who was willing to sign on its behalf, or, absent such a request, to enter a judgment of acquittal.

REASONS FOR GRANTING THE WRIT

This Court should review the decision below, reversing the conviction of the Communist Party for willful failure to register under the Subversive Activities Control Act, because that decision (1) will seriously handicap the enforcement of the entire statute, and (2) is inconsistent with decisions of this Court and the lower federal courts defining the scope of the privilege against self incrimination.

1. This Court held in *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, that the registration provisions of the Subversive Activities Control Act were constitutional and upheld the Board's order that the Party register under the Act. In holding the Act constitutional, the Court recognized that the Act was designed to meet a serious danger to American security arising from Communist-action organizations within the United States which operated under the control, and to carry out the objectives, of the world Communist movement including the overthrow by force, if necessary, of the government of the United States. 367 U.S. at 93–95, 102, 104–105.

The decision of the court below interferes with the operation of this important statute in two significant respects. First, the decision means that, unless the government can prove that volunteers will register the Party, the Act becomes totally inapplicable to the very organization most clearly within its terms. Moreover, the Act probably cannot effectively be applied to Communist-front organizations unless the government similarly can prove the availability of volunteers.

Second, the decision below will delay the application of the Act to the Communist Party for several additional years. The Act was passed in 1950. The Attorney General petitioned the Board to order the Party to register in that same year and, after extensive proceedings, the Board issued its order in 1953. Extended litigation followed, including two more proceedings before the Board, three appeals to the court of appeals, and review on two occasions by this Court. The Party was finally ordered to register in October 1961. After refusing to register, the Party was promptly indicted in December 1961 and convicted in 1962. Now, almost fourteen years after the Act was passed and eleven years after the Board first found the Party came within the Act, the court of appeals has reversed the Party's conviction and ordered a new trial.

2. The decision of the court of appeals is inconsistent with numerous decisions of this Court and of the lower federal courts. Moreover, its rationale, if followed in other areas to which it logically applies, would greatly expand the scope of the Fifth Amendment and would seriously restrict the power of the executive, legislative, and judicial branches of the federal government in obtaining information needed for purposes of regulation, legislation, and litigation.

a. In *Wilson* v. *United States*, 221 U.S. 361, this Court held that an officer of a corporation could not invoke the Fifth Amendment when called upon by a government agency to produce corporate records even though these records were written by him and might incriminate him. The Court reasoned that the cor-

poration had no Fifth Amendment right and that the corporate officer, as its representative, had no greater right. *Id.* at 384–385. Accord, *Wheeler* v. *United States*, 226 U.S. 478; *Grant* v. *United States*, 227 U.S. 74; *Dreier* v. *United States*, 221 U.S. 394.

In *United States* v. *White*, 322 U.S. 694, 699, the Court held:

> [T]he papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity. *Boyd* v. *United States*, 116 U.S. 616. But individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations. In their official capacity, therefore, they have no privilege against self-incrimination. And the official records and documents of the organization that are held by them in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally.

The Court ruled that the privilege against self-incrimination was "limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records"; that "officers and agents acting

in their official capacity cannot invoke this personal privilege" (*id.* at 701), since "they assume the rights, duties, and privileges of the artificial entity or association of which they are agents or officers, and they are bound by its obligations." *Id.* at 699. Accord, *McPhaul* v. *United States*, 364 U.S. 372, 380; *Curcio* v. *United States*, 354 U.S. 118, 122–123. And in *Rogers* v. *United States*, 340 U.S. 367, 371–372, this well-established rule was applied to the Communist Party itself, the Court stating that a Party officer "had no privilege with respect to the books of the Party."

These principles are equally applicable to the claims of self-incrimination by which the Party's officers sought to justify their refusal to file a registration statement for the Party. For it is immaterial whether the officer is required to produce organization records or to file an organization report; the critical consideration is that the officer cannot refuse to submit documents on behalf of his organization because of his claim that their contents will incriminate him individually. This is made clear by *Baltimore & Ohio R.R.* v. *Interstate Commerce Commission*, 221 U.S. 612, where this Court applied the principle enunciated in *Wilson* v. *United States*, *supra*, to hold that an officer of a railroad could not rely upon his personal privilege against self-incrimination to justify his failure to submit to the Commission carrier reports required by the Interstate Commerce Act. The Court stated (221 U.S. at 623): "[W]ith regard to the keeping of suitable records of corporate administration, and the making of reports of corporate action, where these are ordered by the Commission

under the authority of Congress, the officers of the corporation, by virtue of the assumption of their duties as such, are bound by the corporate obligation and cannot claim a personal privilege in hostility to the requirement."[3]

The court below attempted to distinguish *Wilson* and *White* on the ground that "in these cases, in sharp contrast to the present case, the mere act of producing the records was not incriminating" (App. A, p. 26 below). The distinction is unwarranted. The *Wilson* and *White* cases hold that an officer can be required to produce an organization's records when they were made by himself and directly incriminate him. The Fifth Amendment is no more appli-

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[3] There is some question under *Curcio* v. *United States*, *supra*, whether an officer of an organization may refuse, under the Fifth Amendment, to *compile* lists of officers or members. There the Court upheld the refusal of a custodian of books and records to disclose their whereabouts, although he could be ordered to produce them, since this would require "him to disclose the contents of his own mind." 354 U.S. at 128.

We submit that the *Baltimore and Ohio R.R.* case requires officers of organizations to submit reports to the federal government even if this results in disclosure of information in their minds. Moreover, the membership lists can be supplied by reproduction of or extracts from the Party's records. *Communist Party* v. *Subversive Activities Control Board*, 223 F. 2d 531, 547 (C.A. D.C.), reversed on other grounds, 351 U.S. 115. And, finally the first eleven counts of the twelve-count indictment in this case relate only to the failure to file registration form, IS-51A. All that is required by this form is a statement that the Communist Party is registering as a Communist-action organization and the signature of the officer of the Party or the authorized agent executing the form. It is only the twelfth count of the indictment which relates to the second step, the filing of the registration statement, form IS-51, which requires disclosure of officers and members.

cable when an organization's records incriminate only the organization and the officer's production of the records incriminates himself only indirectly by showing his connection with the organization. Thus, in all the cases cited above, the act of producing the records or making the reports also would have connected the officer with a putative criminal enterprise by thereby identifying himself with the organization under investigation.[4]

The court below, however, said that the Communist Party is "sui generis" since "[t]he legislative array facing the Party virtually makes it a criminal conspiracy per se" (App. A, p. 25 below). Membership, or even leadership, in the Communist Party is not automatically a crime. See *Scales* v. *United States*, 367 U.S. 203; *Yates* v. *United States*, 354 U.S. 298. Moreover, if the Fifth Amendment protects a person from disclosing his connection with a conspiracy which is criminal per se, it equally protects a person from disclosing his connection with any group where there is the likelihood of incrimination. The Fifth

[4] For example, in *Wilson* a grand jury, prior to the subpoena, had returned indictments charging Wilson and other officers of a corporation with fraudulent use of the mails and a conspiracy for such use. The indictment related that the device employed to perpetuate the fraud was the corporate entity, the United Wireless Telegraph Company. Record, No. 760, Oct. Term, 1910, pp. 6, 10–16. In *White*, the required response to the subpoena directed solely to the union provided evidence of White's association with a union which was under investigation for alleged criminal activity. Record, No. 366, Oct. Term, 1943, pp. 3–4. *In Baltimore and Ohio R.R.*, the Commission was investigating violations by railroads of a statute limiting hours of work by employees which made the railroad's officers also criminally liable. 221 U.S. at 614.

Amendment does not distinguish between degrees of incrimination as long as the likelihood of incrimination actually exists. As this Court said in *Wilson*, in stating that it was immaterial whether a prosecution had yet been brought, "it is the incriminating tendency of the disclosure and not the pendency of the prosecution against the witness upon which the right depends." 221 U.S. at 379. In the previously cited decisions of this Court, the act of producing records or making reports connected the officer with a possibly criminal enterprise. This is, at most, what the registration required by the Act would do here. Thus it is both impossible and irrelevant to ascertain whether the likelihood of prosecution resulting from the officer's act is any greater in this case than in the earlier cases before this Court.

In short, the Fifth Amendment, under numerous decisions of this Court, does not apply when an officer of an organization is called to produce records or make reports in his official capacity. The officer assumes this obligation by being an officer; he can escape it by simply resigning. Since here the Communist Party was required to submit official reports, its officers could not justify their refusal to do so by invoking the Fifth Amendment.[5]

b. The decision below, while not explicitly dealing with the issue, is also inconsistent with the holding of this Court in *Rogers* v. *United States*, *supra*. There, in determining that a witness had waived his

[5] The holding below is also contrary to a prior decision in the same circuit on the identical issue. *Communist Party* v. *Subversive Activities Control Board*, 223 F. 2d 531 (C.A. D.C.), reversed on other grounds, 351 U.S. 115.

privilege, the Court stated that "[s]ince the privilege against self-incrimination presupposes a real danger of legal detriment arising from the disclosure, petitioner cannot invoke the privilege where response to the specific question in issue here would not further incriminate her." 340 U.S. at 372–373.

The court below assumed that each of the Party's officers would incriminate himself if he signed a registration statement.[6] This assumption is plainly incorrect. If an officer signed a registration statement, he would identify himself as a Party member and officer. As the court below recognized (App. A, p. 27, note 10 below), Section 4(f) of the Act provides that the fact of registration cannot be introduced in any criminal prosecution. Consequently, the only way the government could possibly use this information would be as leads to obtain other evidence which Section 4(f) apparently does not forbid introducing. But it is incredible to suppose that there is not at least one officer of the Communist Party who is known to the government. This Court noted in the *Communist Party* case that the Party's officers have never concealed their identity and that consequently its officials have been known as a matter of "public notice." 367 U.S. at 107. As Appendix C shows (pp. 37–46), officials of the Communist Party have continued to make their Party connections publicly known.[7]

[6] If only one officer could have done so without self-incrimination, the Party's refusal to register was not excusable and its conviction was valid.

[7] Elizabeth Gurley Flynn, the present chairman of the Party, also testified before the Subversive Activities Control Board in 1952 in the *Communist Party* case that she was a Party officer. Record No. 12, Oct. Term 1960, p. 1275.

These are matters of public knowledge of which the courts can take notice. See *Jacobson* v. *Massachusetts*, 197 U.S. 11, 30; *Gay's Gold*, 13 Wall. 358, 362; *New York Indians* v. *United States*, 170 U.S. 1, 32; *United States* v. *A. H. Fischer Lumber Co.*, 162 F. 2d 872, 873 (C.A. 4). Certainly, the courts need not be blind to what everyone else sees. Thus, some—and surely at least one—officers of the Party could have signed a registration statement without providing the government with any new information and therefore without possibly incriminating himself.

c. Even if the officers of the Party did have a constitutional right to refuse to sign the registration statement, an organization which is under a legal obligation to perform an affirmative act also has, as the court below recognized, the obligation to secure someone to act on its behalf in performing its duty (see App. A, pp. 28–29 below). *United States* v. *3963 Bottles*, 265 F. 2d 332 (C.A. 7); *United States* v. *42 Jars*, 162 F. Supp. 944 (D. N.J.), affirmed, 264 F. 2d 666 (C.A. 3); *Simon* v. *American Tobacco Corp.*, 192 Fed. 662 (S.D. N.Y.). The court below, however, held that the government had the duty to prove that a "willing volunteer" was available. The court distinguished the above cases on the ground that they depended on the proposition that an organization can always find someone willing to represent it but that it could not "assume without proof that anyone is willing to submit data the possession of which implies an intimate knowledge of [the Party's] workings" (App. A, p. 29 below).

The court below erred in at least three respects.

First, the cases cited above are squarely in point. In all of them the organizations were accused of wrongdoing and yet the courts required them to find someone to act for them. There is no more likelihood here than in those cases that a genuine effort by the Party, including the payment of a reasonable fee, would be unsuccessful.

Second, an attorney or other agent could register for the Party without having an intimate knowledge of its affairs or indeed any direct knowledge. He could sign the registration form which is involved in the first eleven counts stating that the Party is a Communist-action organizations after merely reading this Court's decision in the *Communist Party* case. He could sign the registration statement which requires the names of officers and members (count 12) on the basis of information supplied by the Party. Moreover, even if such actions did require intimate knowledge of the Party, they would in no way be incriminating since attorneys and other agents frequently obtain detailed information concerning a client without having anything other than a professional connection.

Third, it is again a matter of common knowledge that the Party is represented publicly by attorneys and other spokesmen whenever the Party has deemed this to be beneficial to it.[8] For example, during the last few years, the Communist Party has been en-

[8] On several occasions even in recent months Gus Hall has been quoted and identified in the public press as a leading spokesman of the Communist Party. See, *e.g.*, *New York Times*, December 18, 1963, p. 21.

gaged in extensive efforts to have its spokesmen invited to speak before various groups, particularly before college students (see App. C, pp. 41–45 below). Not only in this case but in numerous others—both as plaintiff and defendant—the Party has had no difficulty in obtaining counsel to represent it. *E.g.*, *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115, 367 U.S. 1; *Communist Party* v. *Catherwood*, 367 U.S. 389.

Thus, there is not the slightest reason to reject in this case the ordinary rule that an organization can find attorneys or other agents to act for it. The Party should have introduced evidence, if it were the fact, that despite its reasonable efforts it could not obtain an attorney or agent. If it had done so, the burden to prove the existence of such persons arguably would have shifted to the government. But the Party offered no such evidence.[9] Indeed, as the court below recognized (App. A, pp. 30–31 below), the evidence showed that the Party had made no effort to comply. The government should not be required, unlike in

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[9] The court below said that the burden of proof could not be placed on the Party since this would require someone to incriminate himself (App. A, p. 30, note 14 below). In *United States* v. *Fleischman*, 339 U.S. 349, 359, and *McPhaul* v. *United States*, *supra*, 364 U.S. at 380, however, this Court placed on the defendant the burden of showing why he had failed to produce records of an organization. Contrary to the court below, such proof might well have incriminated the defendants in those cases. Moreover, here the Party might well have been able to show, if the fact were true, that no attorneys or agents could have been found by producing as witnesses persons who had refused to act for it. Such witnesses obviously would not have incriminated themselves.

every other case, to prove as an element of the offense that "volunteers" existed when the Party has not offered any evidence, contrary to ordinary experience, that attorneys and other agents were unavailable. At the least, the Party cannot be allowed to violate the Act and the order under it which this Court upheld, and then to claim that the government was required to prove a fact which was completely irrelevant to the Party's deliberate conduct.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be granted.

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APRIL 1964.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17583

THE COMMUNIST PARTY OF THE UNITED STATES OF AMERICA, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

Decided December 17, 1963

Before BAZELON, Chief Judge, and WASHINGTON and McGOWAN, Circuit Judges.

BAZELON, *Chief Judge*: The Communist Party of the United States of America appeals its conviction under § 7 and § 15 of the Subversive Activities Control Act[1] for failure to comply with an order of the Subversive Activities Control Board. That order, entered in proceedings commenced some thirteen years ago, found the Party to be a Communist-action organization within the meaning of § 3(3) of the Act and required it to

[1] Title I of the Internal Security Act of Sept. 23, 1950, 64 Stat. 987, 50 U.S.C. § 781 *et seq.* (1958).

register and submit information under § 7 of the Act. The Supreme Court sustained the order. *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1 (1961).[2] The questions before us concern its enforcement.

The Act requires each organization found by the Board to be a Communist-action organization to register as such with the Attorney General [§ 7(a)], and file an accompanying statement [§ 7(d)] containing its name and the address of its principal office, the names of its officers and members during the preceding year (together with their aliases), an account of money received and spent during the preceding year (including sources and purposes), and a list of the organization's printing presses. Both the registration and the statement must be completed on forms prescribed by the Attorney General; by present regulation, 28 C.F.R. §§ 11.200–11.207, these forms are IS–51a (registration) and IS–51 (information). Also by regulation, the completed forms must be signed, either by an officer of the organization, or by a "member, employee, attorney, agent, or other person." If a non-officer signs, he must certify that the organization authorized him to complete and submit the forms.[3] Failure to register or file the statement within thirty days after the order becomes final [§ 7(c)(3)] subjects the organization to a

[2] The full course of the litigation may be traced through the following citations: 96 F. Supp. 47 (D.D.C. 1951) (Three-judge court); 96 U.S.App.D.C. 66, 223 F.2d 531 (1954); 351 U.S. 115 (1956); 102 U.S.App.D.C. 395, 254 F.2d 314 (1958); 107 U.S.App.D.C. 259, 277 F.2d 78 (1959); 367 U.S. 1 (1961).

[3] When the 1961 Communist Party case was decided, and until October 7, 1961, a single form, ISA–1, was prescribed for both registration and information. This form required the signatures of all "partners, officers, and directors, including the members of the governing body of the organization." It did not include the alternative of signing by an "other person."

fine up to $10,000 [§ 15(a)(1)], with each day of failure to register counting as a separate offense [§ 15(a)].

After the Board's order in this case became final upon entry of the Supreme Court's mandate on October 20, 1961, the Party had until November 19 to register without penalty. Before then, the Attorney General received a letter on Party stationery, dated November 10 and signed only with the Party seal, stating that the Party's officers declined, for fear of self-incrimination, to submit the forms or to authorize anyone to submit them:

> These declinations are made by each officer in the exercise of his privilege under the Fifth Amendment to the Constitution not to be a witness against himself. The officers have adopted this means of asserting their respective constitutional privileges because a claim of privilege made in the name of an officer would tend to incriminate him and might constitute a waiver of his privilege.

The Attorney General replied by telegram on November 17, rejecting the claims of privilege contained in the Party's letter and also rejecting the letter as compliance with the order to register. The Party took no further action.

On December 1, the indictment herein was returned. It charged the Party with eleven counts of failing to register (one for each day between November 20 and November 30), and one count of failing to file the statement. At trial, the Party's failure to register and to file the statement was stipulated. The Government called only one witness. He testified that he had attended a press conference on June 8, 1961 (immediately after the Supreme Court's decision) at which Gus Hall announced the Party's intention not

to comply.[4] The Party called no witnesses. Before trial the Party moved to dismiss the indictment, and at the end of the trial it moved for a judgment of acquittal. In both these motions the Party argued, *inter alia*, that its failure to comply was legally justified because the regulations accompanying § 7 require the registration and information forms to be signed by a natural person, and under *Patricia Blau v. United States*, 340 U.S. 159 (1959), anyone who signed would be admitting an incriminating association. Thus, argued the Party, unless someone were willing to incriminate himself, there was no way in which the Party could register. The Government responded that the officers had a duty to sign for the Party and could not claim the privilege as legal justification for avoiding this duty, and that even if they could, the Party was not relieved of its duty to register but must get someone else to sign the forms on its behalf.

The motions to dismiss and for acquittal were denied. The jury was instructed that no issue of self-incrimination was before it, the critical question being whether the Party's failure to comply was intentional rather than accidental or inadvertent. A verdict of guilty was returned on all twelve counts. The court imposed the maximum sentence, fines totaling $120,000, and the Party brought this appeal. We

[4] Seated with Gus Hall at the press conference were Benjamin Davis and Elizabeth Gurley Flynn. Although the Government alleges that all three occupy positions of leadership in the Party as a matter of "common knowledge," there is nothing in the record to indicate their status other than the tenor of Gus Hall's remarks and testimony that the press conference took place at Communist Party headquarters.

disagree with the trial court's disposition of the self-incrimination issues.[5]

The regulations accompanying § 7 of the Act imposed a duty upon the Party to file certain forms signed by a natural person. To sustain a criminal charge for failure to comply, it must appear that someone was available who was either legally bound or willing to sign. Ordinarily, proof of this essential element may be supplied by presumptions that (1) an organization's legal obligation devolves upon its officers, whose failure to execute the obligation makes the organization liable; and (2) if an officer has legal justification for refusing to act, the organization can provide someone else who will act for it. The question before us is whether these presumptions apply in the circumstances of this case.

This problem must be viewed against the background of American history during the past generation. That history shows that the Communist Party does not stand before the law as an ordinary political group. The Party's special status does not arise from the unpopularity of its views, or the public opprobrium attaching to it and its adherents. See *Communist Party* v. *Subversive Activities Control*

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[5] In the 1961 *Communist Party* case, the Party argued that its inability to register unless someone incriminated himself by signing the prescribed registration forms made the Act unconstitutional. But the Supreme Court refused to consider any self-incrimination issues until there was an actual claim of the privilege. And, the Court added, if no claim was made because of fear that a claimant would incriminate himself merely by revealing his identity, the issue would be reached if and when the Party raised it to avoid concrete legal harm, "when enforcement proceedings for failure to register are instituted against the Party." 367 U.S. at 109. Accordingly, the issues raised by the signature requirement of Forms IS-51 and IS-51a are now ripe.

Board, 367 U.S. at 102–03. Instead, it arises from the imposition of governmental sanctions upon the Party and its members, based on a special danger to our national security. On that ground, statutes have been sustained which might otherwise have raised serious constitutional objections. See *American Communications Ass'n* v. *Douds*, 339 U.S. 382 (1950); *Carlson* v. *Landon*, 342 U.S. 524 (1952); *Galvan* v. *Press*, 347 U.S. 522 (1954); *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. at 104–05; *Scales* v. *United States*, 367 U.S. 203, 224–28 (1961); *Barenblatt* v. *United States*, 360 U.S. 109, 128 (1959). See also *American Communications Ass'n* v. *Douds*, *supra* at 422 (opinion of Jackson, J.). Civil disabilities imposed on adherents of the Communist movement include prohibitions on entering the United States,[6] denial of Social Security benefits,[7] and ineligibility for many forms of employment.[8]

Most critical for present purposes are the criminal sanctions. Since 1940, the Smith Act has threatened with fine and imprisonment anyone who:

> organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any [government in the United States] by force or violence; or becomes or is a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof. [18 U.S.C. § 2385][9]

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[6] See, *e.g.*, *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953).

[7] See, *e.g.*, *Flemming* v. *Nestor*, 363 U.S. 603 (1960).

[8] See, *e.g.*, *Adler* v. *Board of Education*, 342 U.S. 485 (1952).

[9] Compare § 4(a) of the Subversive Activities Control Act:

> "It shall be unlawful for any person knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictator-

And with the successful application of the membership clause in *Scales* v. *United States, supra,* it is not necessary to prove that a defendant himself has taught, advocated, or encouraged the overthrow or destruction of a government by force or violence. It must be shown that the organization advocates the overthrow, see *Noto* v. *United States,* 367 U.S. 290 (1961), but with respect to the Communist Party, Congress has supplied this showing. The Communist Control Act of 1954 declares:

> SEC. 2. The Congress finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. . . . Therefore, the Communist Party should be outlawed. [50 U.S.C. § 841]

And the Act proceeds:

> SEC. 3. The Communist Party of the United States . . . [is] not entitled to any of the rights privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof. [50 U.S.C. § 842]

The conclusion is inescapable that the Communist Party is sui generis. The legislative array facing the Party virtually makes it a criminal conspiracy per se. Confirmation of this status is contained in a series of Supreme Court cases holding that mere association with the Communist Party presents sufficient threat of criminal prosecution to support a claim of the privilege against self-incrimination. *Particia Blau* v. *United States,* 340 U.S. 159 (1950)

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ship . . . the direction and control of which is to be vested in, or exercised by or under the domination or control of, any foreign government, foreign organization, or foreign individual. . . ." 50 U.S.C. § 783(a).

(employment by the Party or "intimate knowledge of its workings"); *Irving Blau* v. *United States* 340 U.S. 332 (1951); *Brunner* v. *United States*, 343 U.S. 918 (1952) (attendance at Party meetings); *Quinn* v. *United States*, 349 U.S. 155 (1955) (membership). It is against this background that we consider whether an officer or non-officer was available to sign the forms on behalf of the Party.

By assuming office in an organization one does not waive his privilege against self-incrimination, even in matters closely related to the organization's affairs. *Curcio* v. *United States*, 354 U.S. 118 (1957). The privilege may be unavailable where the officer's representative duties are involved. Thus, under the "required records" doctrine, an officer may not refuse to produce books and records *belonging to the organization*, on the ground that the contents will incriminate *him*. *United States* v. *Wilson*, 221 U.S. 361 (1911); *United States* v. *White*, 322 U.S. 694 (1944). But in those cases, in sharp contrast to the present case, the mere act of producing the records was not incriminating. *Wilson* and *White* furnish no authority for compelling an officer to identify himself as such where, as here, such identification, without more, incriminates him.

Other cases indicate strongly that when the mere act of producing information is incriminating, the privilege is available even if it makes the information unavailable. Thus, although an officer who produces books and records may be required to supply "auxiliary information," such as authentication of the items produced, *United States* v. *Austin-Bagley Corp.*, 31 F. 2d 229 (2d Cir. 1929), this doctrine is sharply limited to information which creates no danger of incrimination. *Curcio* v. *United States*, *supra*; see *Arndstein* v. *McCarthy*, 254 U.S. 71 (1920). And this is true even where the officer is asked only to describe

the contents of books which he was bound to produce but which were lost or stolen. *United States* v. *Daisart Sportswear, Inc.*, 169 F. 2d 856 (2d Cir. 1948). In *Rogers* v. *United States*, 340 U.S. 367 (1951), a district court held an officer of the Communist Party in contempt for refusing to produce books and records of the Party subpoenaed by a grand jury. The officer had testified before the grand jury that she had given the books and records to someone else but refused to say to whom, on the ground that she would incriminate herself by "mere disclosure of the name of the recipient of the books." Although the Supreme Court sustained the conviction, its opinion makes clear that the claim of privilege would have been upheld except that the officer had waived her privilege by testifying earlier in the same proceeding to her "membership, activities and office in the Party."

Russell v. *United States*, 306 F. 2d 402 (9th Cir. 1962), held that a statute requiring registration of firearms whose possession violated certain other criminal provisions compelled incriminating admissions and was thus an unconstitutional infringement of the fifth amendment privilege. Here, just as in *Russell*, "the act of registering is necessarily incriminating whether or not any information other than the registrant's name is supplied * * *." 306 F. 2d at 410, n. 16. See also *United States* v. *Lombardo*, 228 Fed. 980 (W.D. Wash. 1915), *aff'd on other grounds*, 241 U.S. 73 (1916). We hold that the privilege against self-incrimination was available to the officers as legal justification for refusing to sign forms IS-51 and IS-51a.[10] Since the officers could not identify themselves

[10] Section 4(f) of the Subversive Activities Control Act, the immunity provision, is inadequate since it prevents only introduction of the fact of registration into evidence at a criminal trial and does not prevent the Government from using knowl-

in claiming the privilege without surrendering its protection, see *Russell* v. *United States*, *supra*, the November 10 letter was a sufficient assertion of their claim.[11] It follows that the jury should have been instructed that the officers were privileged not to sign and that no liability attached to the Party by reason of their refusal.

This does not exhaust the Party's responsibility. The regulations permit the forms to be signed by a "member, employee, attorney, agent, or other person." And it has been held in cases involving the duty of an organization to provide information that if the person selected by the organization to act on its behalf claims the privilege against self-incrimination, it must select someone else who can act without incriminating himself:

> It will thus be the clear duty of the corporation to select an officer or agent for the above pur-

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edge gained from registration to acquire evidence which can be introduced. *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892). Compare the immunity granted witnesses before the Board by the last sentence of § 13(c). *Cf. Scales* v. *United States*, 367 U.S. at 206–19, especially 219.

[11] We need not decide whether the Communist Party has standing to "assert the [privilege] of its officers," see *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. at 184–88 (Douglas, J., dissenting). The problem would arise only if the Party sought to justify its conduct by reference to a privilege available to the officers but not claimed by them. Such a situation was before the Supreme Court in the 1961 *Communist Party* case, and would be before us if the Party were refusing to submit membership lists on the ground that the members would be incriminated. In this case, the Party did two things, which may not be added together to form an "assertion of the officers' privilege." It relied on the officers' refusal to sign, which they justified by asserting their own privilege, and it communicated notice of their assertion by sending the letter of November 10.

> pose who will not have personally participated in anywise in any such questionable transaction, and who thus cannot be incriminated by such answers. This the corporation can easily do under its broad corporate powers, using even its attorney, for instance, whose duty it would then be to "furnish such information as is available to the party."

United States v. *42 Jars*, 162 F. Supp. 944, 946 (D. N.J. 1958), *affirmed*, 264 F. 2d 666 (3d Cir. 1959). See also *United States* v. *3963 Bottles*, 265 F. 2d 332 (7th Cir. 1959); *Simon* v. *American Tobacco Corp.*, 192 Fed. 662 (S.D.N.Y. 1912). These cases seem to support a legal presumption that an organization can always find someone willing, even if not legally bound, to act for it. But we think no such presumption can fairly be applied to the Communist Party. Since mere association with the Party incriminates, we cannot assume without proof that anyone is willing to submit data the possession of which implies an "intimate knowledge of [the Party's] workings." Whether or not such a volunteer was available is a question of fact which requires proof.

We must therefore consider who has the burden of such proof. Ordinarily the government must prove beyond a reasonable doubt each element of the offense charged. But where the pertinent information is much more readily available to the defendant than to the government, the burden may be shifted to him, provided this can be done "without subjecting the accused to hardship or oppression." *Morrison* v. *California*, 291 U.S. 82, 87–89 (1934). The proviso is required to safeguard the presumption of innocence. In the present case, we assume that the Party would be more likely than the government to know whether a willing volunteer was available.[12] But to place the

[12] Yet a volunteer not intimately associated with the Party might perhaps make his availability known to the government.

burden of proof on the Party would require it to prove, at the very least, that some person made reasonable efforts on its behalf to find a volunteer, and that such efforts failed. It is unlikely that the Party could make this proof unless someone waived his privilege and testified to his efforts on behalf of the Party in seeking a signer. If the burden were placed on the Party, unless someone waived his privilege the issue would be resolved against the Party by default. Thus the Party would be under duress to induce someone to waive. This is the sort of "hardship or oppression" to which the defendant in a criminal case should not be subjected.[13] Therefore the burden of proving that a willing volunteer was not available may not be assigned to the Party. The burden of proving that a volunteer *was* available remains with the government.[14]

The government presented no evidence that a volunteer was available. Gus Hall's statement that the Party would not comply with the Act and the Party's letter saying the officers refused to authorize anyone to execute the forms, tended to establish only that the

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[13] *In Boyd* v. *United States*, 116 U.S. 616 (1886), a statute provided that government allegations in forfeiture proceedings were to be taken as proved if a claimant refused to produce documents which the government said would tend to prove its allegations. The Supreme Court held that forcing a claimant to give up documents which might well be incriminating, in order to refute government allegations which would result in loss of his property, was unconstitutional because it put pressure on the claimant to waive his privilege.

[14] In *United States* v. *Fleischman*, 339 U.S. 349 (1950); and *McPhaul* v. *United States*, 364 U.S. 372 (1960), the Supreme Court upheld placing on the defendant the burden of showing justification for failure to produce books and records of an organization, but it does not appear in either case that he would have subjected himself to the danger of self-incrimination in discharging his burden.

Party did not wish to comply and did not try to get someone to act on its behalf. Where, as here, an element of the offense requires proof that the defendant could have complied, it is not established merely by proof that the defendant had no intention of complying.

In *Heikkinen* v. *United States*, 355 U.S. 273 (1958), an alien had been convicted under § 20(c) of the Immigration Act of 1917 of willfully failing to depart the United States within six months after he was ordered deported.[15] He could not depart unless another country would accept his application for admission. The government showed that the alien made no such application but did not show that any country would have admitted him. The Supreme Court reversed the conviction for lack of evidence, saying "there can be no willful failure to depart until 'the country willing to accept him is identified.'" So here, there can be no willful failure of the Party to register until it is shown that someone was willing to sign on its behalf.[16]

We do not hold that an organization may claim the privilege against self-incrimination, nor that an individual may claim the privilege on behalf of an organization or its members. We express no opinion concerning the Communist Party's duty to submit the data demanded. We hold only that the availability of someone to sign the forms was an element of the offense; that the officers who should otherwise have signed, were unavailable by reason of their valid claim of the privilege against self-incrimination; that the government had the burden of showing that

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[15] 39 Stat. 890 (1917), as amended, 8 U.S.C. § 1252(c).

[16] Although the word "willful" does not appear in § 15, we think willfulness is a necessary element of the crime of failing to register, as the government recognized in the indictment.

a volunteer was available; and that its failure to discharge this burden requires reversal of the conviction. Because the issues are novel, it seems "just under the circumstances," 28 U.S.C. § 2106, to afford the government an opportunity to present the proof required by our holding. The case is remanded to the District Court "with instructions to grant a new trial if the Government shall request it; or, absent such a request, to enter a judgment of acquittal." *Wright* v. *United States*, 102 U.S. App. D.C. 36, 250 F. 2d 4 (1957). See also *Douglas* v. *United States*, 99 U.S. App. D.C. 232, 239 F. 2d 52 (1956); *Bryan* v. *United States*, 338 U.S. 552 (1950).

So ordered.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17583. September Term, 1963. *Criminal 1010–61*

THE COMMUNIST PARTY OF THE UNITED STATES OF AMERICA, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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Before: BAZELON, Chief Judge, and WASHINGTON and McGOWAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, reversed, and that this case be, and it is hereby remanded to the District Court with instructions to grant a new trial if the Government shall request it; or, absent such a request, to enter a judgment of acquittal.

Per Chief Judge BAZELON.

Dated: Dec. 17, 1963.

APPENDIX B

The Subversive Activities Control Act of 1950, 64 Stat. 987, 50 U.S.C. 781, *et seq.*, provides in pertinent part:

SEC. 3. For the purposes of this title—

* * * * *

(3) The term "Communist-action organization" means—

(a) any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title; * * *.

* * * * *

SEC. 4. (f) Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under section 7 or section 8 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute.

SEC. 7. (a) Each Communist-action organization (including any organization required by a final order of the Board, to register as a Communist-action organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a Communist-action organization.

* * * * * *

(c) The registration required by subsection (a) or (b) shall be made—

* * * * * *

(3) In the case of an organization which by a final order of the Board is required to register, within thirty days after such order becomes final.

(d) The registration made under subsection (a) or (b) shall be accompanied by a registration statement, to be prepared and filed in such manner and form as the Attorney General shall by regulations prescribe, containing the following information:

(1) The name of the organization, and the address of its principal office.

(2) The name and last-known address of each individual who is at the time of filing of such registration statement, and of each individual who was at any time during the period of twelve full calendar months next preceding the filing of such statement, an officer of the organization, with the designation or title of the office so held, and with a brief statement of the duties and functions of such individual as such officer.

(3) An accounting, in such form and detail as the Attorney General shall by regulations prescribe, of all moneys received and expended (including the sources from which received and the purposes for which

expended) by the organization during the period of twelve full calendar months next preceding the filing of such statement.

(4) In the case of a Communist-action organization, the name and last-known address of each individual who was a member of the organization at any time during the period of twelve full calendar months preceding the filing of such statement.

(5) In the case of any officer or member whose name is required to be shown in such statement, and who uses or has used or who is or has been known by more than one name, each name which such officer or member uses or has used or by which he is known or has been known.

(6) A listing, in such form and detail as the Attorney General shall by regulation prescribe, of all printing presses and machines including but not limited to rotary presses, flatbed cylinder presses, platen presses, lithographs, offsets, photo-offsets, mimeograph machines, multigraph machines, multilith machines, duplicating machines, ditto machines, linotype machines, intertype machines, monotype machines, and all other types of printing presses, typesetting machines or any mechanical devices used or intended to be used, or capable of being used to produce or publish printed matter or material, which are in the possession, custody, ownership, or control of the Communist-action or Communist-front organization or its officers, members, affiliates, associates, group, or groups in which the Communist-action or Communist-front organization, its officers or members have an interest.

APPENDIX C

The following are a few examples of the repeated public identification made by the Communist Party's officers, members, or representatives during the period from January 1961 to the present concerning their relationship to the Party. This compilation is taken from public sources only, such as newspaper accounts and radio and television broadcasts.

On January 24, 1962, the *San Francisco Chronicle* quoted Gus Hall as having stated on the previous day that he was "an authoritative spokesman for the communists of America." That same day, the *San Francisco Examiner* quoted Hall as having identified himself as an "authoritative spokesman" for the Communist Party.

On February 13, 1962, the *Portland Oregonian*, reported that Hall stated at a press conference held on February 12, 1962, that he was a "spokesman" for the Communist Party.

The February 25, 1962, edition of *The Worker*, the official newspaper of the Communist Party, contained an article reporting that Hall spoke at Stanford University on February 15, 1962. Hall was identified in this article as a "communist spokesman." The *Daily Palo Alto Times* of February 16, 1962, reported that Hall had described himself as an "authoritative spokesman" for the American Communist Party. The article said that he spent nearly half of his one-hour address stating why he had not registered as a Communist Party member.

On May 6, 1962, in a filmed interview telecast on CBS-TV in Chicago, Gus Hall stated that he was employed by the Communist Party.

An article in the May 8, 1962, issue of *The Daily Cardinal* of the University of Wisconsin, stated that

Hall spoke on May 7, 1962, on the subject "The Communist Viewpoint." An article appearing in *The Wisconsin State Journal* of Madison, Wisconsin, of May 8, 1962, said that Hall stated that he was there to give the Communist slant on things from a Communist's viewpoint. The May 8, 1962, issue of *The Milwaukee Sentinel* contained an article reporting Hall's appearance at a news conference preceding his address. The article stated that Hall indicated that he was anxious to meet the press because he must continually deny that he or his Party has gone underground.

On February 17, 1962, Benjamin Davis stated on a radio program broadcast over WAVI in Dayton, Ohio, "I'm very proud to be a Communist." The February 25, 1962, issue of *The Worker* reported this broadcast and referred to Davis as a spokesman for the Communist Party.

The March 14, 1961, edition of the *New York Times* carried an article which described a news conference held by Elizabeth Gurley Flynn at the office of *The Worker*. The article reported that Mrs. Flynn declared that she was the newly elected chairman of the Communist Party and that she had been a Party member since 1926.

On June 20, 1961, *The Chicago American* carried an article describing an interview with Claude Lightfoot in the offices of the Illinois Communist Party. This article noted that Lightfoot had stated that the members of the Communist Party in Illinois had shrunk from a peak membership of eight thousand in the late 1930's to about one thousand at the present time. The *Hyde Park Herald*, a Chicago local area newspaper, carried a one-page paid advertisement on February 26, 1961, signed by Claude Lightfoot as vice chairman of the Communist Party.

On November 18, 1961, Lightfoot appeared as a guest on the Chicago CBS television program "Insight." He was introduced as a former Vice Chairman of the Communist Party. During the interview he stated that he was presently a member of the Communist Party, that he had spent 31 years in the Party, and that he was an "executive of the organization."

During 1961 and 1962, Dorothy Healey made eleven appearances on a program entitled "Open Platform" which is broadcast over KPFK in Los Angeles, California. During these appearances, Healey was introduced as "chairman of the Communist Party in Southern California" or as "local spokesman for the Communist Party in Southern California."

The September 18, 1961, issue of *The Spokesman Review*, which is published in Spokane, Washington, contained an article setting forth a letter to the newspaper by Burt Nelson in which he identified himself as the "Chairman of the Communist Party of Washington." The first paragraph of this letter stated:

> A recent statement by Gus Hall, General Secretary of the Communist Party of the United States, discusses questions prompted by the emergence, in our country, of an ultra-right political movement. In this state we are mailing it extensively to those who are actively interested in constitutional liberties, labor, peace, education and public affairs generally.

The Seattle Daily Times on December 1, 1961, stated that Burt Nelson said that he preferred to be identified as a Communist "spokesman" although he was introduced at a recent press conference as the "State Chairman of the Communist Party." The article continued that Nelson implied that the change in identification was connected with the registration deadline and the penalties provided for not registering under the Subversive Activities Control Act.

On December 19, 1961, Burt Nelson was interviewed on television station KOMO of Seattle. In this interview, Nelson identified himself as a "spokesman" for the Communist Party and stated that he had been a member of the Communist Party for about 20 years. On December 20, 1961, Burt Nelson likewise said during an interview on KOMO-TV in Seattle, that he was a Communist and had been so for about 20 years.

A taped interview with Albert Lima was broadcast over KGO in San Francisco on November 17, 1961. Lima stated that he was listed as the Chairman of the Northern California District of the Communist Party. During an interview on KGO-TV on November 20, 1961, Lima stated that he was Chairman of the Northern California District of the Communist Party. On December 21, 1961, Lima again said over KCBS in San Francisco that he was the leader of the Communist Party in Northern California. Similar interviews were broadcast on KCBS on November 30, 1961, and on Station KKHI, San Francisco, on November 29, 1961.

The Beloit Daily News of Beloit, Wisconsin carried an advertisement on July 24, 1961, captioned "An Open Letter to the American People," dealing with this Court's decision in the *Communist Party* case. The advertisement said: "This statement is made available through voluntary contributions from citizens of diverse political views and affiliations in the interest of public information and constitutional liberties. Fred B. Blair—3236 North 15th Street—Milwaukee 6, Wisconsin." At the end of the advertisement, the following appeared: "National Committee, Communist Party, USA, 23 West 26th Street, New York 10, New York, Gus Hall, General Secretary."

The following is a partial listing of recent newspaper accounts containing references to Communist

Party leaders or spokesmen concerning their appearances at various colleges. The individual's connection with the Communist Party is set forth as reflected in the news article.

GUS HALL

Newspaper or College Publication	College Or University	Manner In Which Identified
Richmond, Virginia, "Times Dispatch," January 31, 1963	University of Virginia	"Secretary of the American Communist Party"
Charlottesville, Virginia, "Daily Progress," January 31, 1963	University of Virginia	"United States Communist Party Secretary"
Yale University, "Daily News," February 11, 1963	Yale University	"General Secretary of the Communist Party, USA"
Hartford, Connecticut, "Times," February 14, 1963	Yale University	"General Secretary of the Communist Party in the United States"
Philadelphia, Pennsylvania, "Inquirer," October 15, 1962	Philadelphia Social Science Forum	"One of the Nation's Top Communists"
Seattle, Washington, "Times-Intelligencer," February 2, 1962	University of Washington	"Communist Leader"
Seattle, Washington, "Times," February 10, 1962	University of Washington	"General Secretary of the Communist Party in the United States"
Seattle, Washington, "Times," February 20, 1962	University of Washington	"National Communist Leader"
New York, "Daily News," May 3, 1962	Hunter College	"Communist Official"
Chicago, Illinois, "American," May 5, 1962	University of Chicago	"The Nation's Leading Communist"
Chicago, Illinois, "Daily News," May 5, 1962	University of Chicago	"General Secretary of the Communist Party in the United States"
Milwaukee, Wisconsin, "Sentinel" May 5, 1962	University of Wisconsin	"General Secretary of the American Communist Party"
New York, "Herald-Tribune," October 20, 1962	Fairleigh Dickinson University	"Chairman of the American Communist Party"
Wisconsin "State Journal," May 8, 1962	University of Wisconsin	"The Top Communist in the United States"
"Daily Cardinal," May 8, 1962	University of Wisconsin	"General Secretary of the Communist Party of America"
Boston, Massachusetts, "Globe," March 12, 1963	Brandeis University	"General Secretary of the American Communist Party"
Washington, D.C., "Evening Star," February 14, 1963	Yale University	"Communist Leader"
"Yale Daily News," February 14, 1963	Yale University	"American Communist Party Boss" and "America's Top Communist."
Philadelphia, Pennsylvania, "Inquirer," April 30, 1962	Swarthmore College	"General Secretary of the Communist Party, USA"
Palo Alto, California, "Daily Times," February 16, 1962	Stanford University	"Authoritative Spokesman for the American Communist Party"
San Francisco, California, "Examiner," February 16, 1962	Stanford University	"Executive Secretary of the National Communist Party"
San Francisco, California, "News-Call Bulletin," January 25, 1962	University of California	"United States Communist Boss"

James Edward Jackson, Jr.

Newspaper or College Publication	College or University	Manner In Which Identified
Waterville, Maine, "Morning Sentinel," May 19, 1952	Colby College	"Editor of 'The Worker,' the Communist Party Paper in the United States"

Anthony Krchmarek

Newspaper or College Publication	College or University	Manner In Which Identified
"The Record," March 10, 1961	Antioch College	"Ohio Communist Party Chairman"

Samuel Kushner

Newspaper or College Publication	College or University	Manner In Which Identified
"North Central Chronicle," May 12, 1961	North Central College of Illinois	"Vice Chairman of the Communist Party of Illinois."

Elizabeth Gurley Flynn

Newspaper or College Publication	College or University	Manner In Which Identified
Rockford, Illinois, "Morning Star," November 9, 1952	Northern Illinois University	"A Spokesman of the Communist Party."

Robert Thompson

Newspaper or College Publication	College or University	Manner In Which Identified
Detroit, Michigan, "Free Press," May 17, 1952	Michigan State University	"A Member of the Communist Party."

Hyman Lumer

Newspaper or College Publication	College or University	Manner In Which Identified
"The Muhlenberg Weekly," October 10, 1952	Muhlenberg College	"A Leading Communist Spokesman"
Allentown, Pennsylvania, "Evening Chronicle," October 10, 1952	Muhlenberg College	"Official Representative of the United States Communist Party."

Mortimer Daniel Rubin

Newspaper Or College Publication	College Or University	Manner In Which Identified
Greeley, Colorado, "Daily Tribune," April 9, 1963.	Colorado State College.	"United States Communist Party Spokesman."
"The Minnesota Daily," November 9, 1962.	University of Minnesota.	"A Prominent Communist."
Minneapolis, Minnesota, "Star," November 29, 1962.	University of Minnesota.	"A Communist Editor."
"The Daily Iowan," December 4, 1962.	The State University of Iowa.	"A Communist Editor."
Columbus, Ohio, "Evening Dispatch," October 31, 1961.	Ohio State University.	"One of the Two Most Promising and Active Communists."

Arnold Johnson

Newspaper Or College Publication	College Or University	Manner In Which Identified
Cambridge, Ohio, "Daily Jeffersonian," January 5, 1963.	Muskingum College.	"A Widely Known American Communist."
Zanesville, Ohio, "Times Recorder," January 10, 1963.	Muskingum College.	"Public Information Director of the Communist Party, USA."
"The Trinity Tripod," December 7, 1962.	Trinity College.	"United States Communist."
Hartford, Connecticut, "Hartford Times," December 5, 1962.	Trinity College.	"American Communist Party Official."
Utica, New York, "Observer-Dispatch," April 10, 1962.	Hamilton College.	"A Veteran Communist."

Albert J. Lima

Newspaper Or College Publication	College Or University	Manner In Which Identified
San Francisco, California, "Examiner," July 28, 1962.	University of California.	"Northern California Chairman of the Communist Party."
San Francisco, California, "Examiner," October 9, 1963.	Marin College.	"A Communist Party Leader."
San Rafael, California, "Independent Journal," October 9, 1963.	Marin College.	"Northern California District Chairman of the Communist Party."
"The Stanford Daily," April 5, 1962.	Stanford University.	"Head of the Communist Party in Northern California."

DOROTHY HEALEY

Newspaper Or College Publication	College Or University	Manner In Which Identified
Santa Monica, California, "Evening Outlook," October 5, 1963.	University of California at Los Angeles.	"Secretary of the Communist Party in Southern California."
Los Angeles, California, "Times," October 17, 1963.	The California Institute of Technology.	"Chairman of the Communist Party in Southern California."
Riverside, California, "Daily Enterprise," November 13, 1963.	The University of California at Riverside.	"Chairman of the Communist Party of Southern California."
Los Angeles, California, "Times," September 27, 1962.	The University of California at Riverside.	"Secretary of the Communist Party in Los Angeles."
Clovis, New Mexico, "News Journal," April 8, 1962.	Eastern New Mexico University.	"Chairman of the Communist Party in Southern California."

CARL WINTER

Newspaper Or College Publication	College Or University	Manner In Which Identified
"The Daily Collegian," January 18, 1963.	Wayne State University.	"Midwest Correspondent of 'The Worker,' a Communist Party Newspaper."
"The Kalamazoo College Index," December 7, 1962.	Kalamazoo College.	"Michigan Chairman of the Communist Party."
"The Michigan Daily," May 17, 1963.	University of Michigan.	"Head of the Communist Party in Michigan."
Ann Arbor, Michigan, "News," April 20, 1963.	University of Michigan.	"American Communist."

HERBERT EUGENE APTHEKER

Newspaper Or College Publication	College Or University	Manner In Which Identified
San Francisco, California, "Examiner," February 23, 1963.	San Francisco State College.	"A Top United States Communist."
"The Daily Californian," February 25, 1963.	Berkeley College, Berkeley, California.	"A Communist Writer and Journalist."
Ann Arbor, Michigan, "News," March 13, 1963.	University of Michigan.	"Editor of 'Political Affairs' Magazine, an Organ of the United States Communist Party."
Washington, D.C., "Sunday Star," March 17, 1963.	Howard University.	"Member of the United States Communist Party's National Committee."
"The Chicago Maroon," March 29, 1963.	University of Chicago.	"Editor of 'Political Affairs,' a Theoretical Organ of the American Communist Party."
"The Daily Cardinal," March 27, 1963.	University of Wisconsin.	"Leading Intellectual Spokesman for the American Communist Party."
"University of Washington Daily," May 8, 1963.	University of Washington.	"A Communist and a Communist Party Theorist."
"The State Journal," January 18, 1963.	Michigan State University.	"Communist Spokesman and Editor of the Leading Communist Political Magazine in the Country."
Los Angeles, California, "Herald-Examiner," October 15, 1963.	Hollywood High School.	"A Top Communist."
"The Spartan Daily," October 30, 1963.	San Jose, California, State College.	"Self-avowed Leader of the Communist Party in the United States."

BENJAMIN J. DAVIS, JR.

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"Daily Pennsylvanian," February 1, 1963	University of Pennsylvania.	"A Spokesman for the United States Communist Party."
New York "Times," October 10, 1961.	Queens College	"National Secretary of the Communist Party, USA."
New York "Times," October 31, 1961.	Columbia University	"Secretary of the Communist Party of the United States."
Providence, Rhode Island, "Evening Bulletin," January 31, 1963.	Brown University	"National Secretary of the Communist Party."
Lorain, Ohio, "Journal," May 7, 1963.	Oberlin College	"United States Communist Leader."
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Seattle, Washington, "Times," October 31, 1962.	University of Washington.	"National Chairman of the Communist Party."
St. Paul, Minnesota, "Dispatch," April 20, 1962.	University of Minnesota.	"A National Spokesman for the Communist Party of the United States."
Minneapolis, Minnesota, "Daily Herald," May 3, 1962.	University of Minnesota.	"Executive Secretary of the Communist Party of the United States."

U.S. GOVERNMENT PRINTING OFFICE: 1964

IN THE

Supreme Court of the United States

October Term, 1963

No. 1027

UNITED STATES OF AMERICA,

Petitioner,

v.

COMMUNIST PARTY OF THE UNITED STATES,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Questions Presented

The following questions are presented by the disposition of the case in the court below:

1. Whether respondent's officers could rightfully refuse, on the ground of their privilege against self-incrimination, to execute under their names and titles and file with the Attorney General forms registering respondent under section 7 of the Subversive Activities Control Act (hereinafter called the Act).

2. Whether, in a prosecution of respondent for willful failure to comply with the registration order of the Subversive Activities Control Board (hereinafter called the Board), the burden is upon the government to prove (a) that an officer of respondent was willing to forego his constitutional privilege by authorizing a third person to execute and file the registration documents for respondent and (b) that some third person, if so authorized, would have been willing to execute and file such documents for respondent.

The following questions were raised in, but not reached by, the court below. If certiorari is granted they will be briefed by respondent as additional grounds to support the judgment reversing respondent's conviction:

3. Whether respondent can constitutionally be convicted for its failure to file a registration form which requires it to describe itself as a Communist-action organization.

4. Whether respondent, not having registered under section 7(a) of the Act, was required to file a registration statement pursuant to section 7(d).

5. Whether the jury should have been instructed that respondent could not be convicted unless the failure to comply with the Board's registration order was actuated by an evil purpose and was without a justifiable excuse.

6. Whether sections 7 and 15 of the Act unconstitutionally denied respondent a judicial and jury trial on the issue of whether it is a Communist-action organization.

7. Whether the requirement that respondent file a registration statement under section 7(d) of the Act is unconstitutional because the statement makes demands which are excessively vague and calls for information which respondent cannot obtain.

8. Whether the trial court denied an adequate voir dire examination of the prospective jurors.

9. Whether the indictment should have been dismissed because of the presence of government employees on the grand jury or, in the alternative, whether the trial court should have conducted a hearing on the qualifications of the grand jurors.

10. Whether the cumulative sentences imposed by the trial court violate the Eighth Amendment's prohibition of excessive fines and due process.

Statement

The Act provides that an organization which is required to register as a Communist-action organization shall do so on a form prescribed by the Attorney General and that its registration shall be accompanied by a registration statement prepared and filed in such manner and form as the Attorney General shall prescribe (sec. 7(a) and (d)). Amended regulations of the Attorney General effective October 7, 1961, prescribe that registration shall be accomplished by the filing with him of a form, IS-51a, designated as a "registration form" (J.A. 56-58). This form, which calls for no information except the name and address of the registrant, requires a declaration that the registrant "hereby registers as a Communist-action organization." The amended regulations also require the filing of a second form, IS-51, designated as a "registration statement" (J.A. 58-63) which again calls for the registrant's name and address, as well as for the names of its officers and members and the information concerning its finances and printing equipment specified in section 7(d).

The two forms may be executed in either one of two ways. They may be signed on behalf of the registrant by one of its officers who subscribes his title. Or they may be signed by any person who states his address and who certifies, on the registration form that he has been authorized by the registrant to register it, and on the registration statement that he has been authorized by the registrant to file the statement. (J.A. 57-59, 63).[1]

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[1] The amended regulations and forms superseded the regulations and form described in *Communist Party* v. *Subversive Activities Control Board*, 367 U. S. 1, 105 (herein called the *Party* case). Under the prior regulations, registration and the registration statement were combined in a single form which required the signatures of all of the registrant's officers and which made no provision for an alternative mode of execution.

The deadline for the registration of respondent under the Act was November 19, 1961.[2] On November 10, 1961, respondent mailed a letter to the Assistant Attorney General, Internal Security Division, Department of Justice,[3] which was received in the Department the following day and by the Internal Security Division on November 13. The letter was on respondent's letterhead, carrying its name and address, and bore the typewritten subscription, "Communist Party of the United States by its authorized officers" and respondent's seal. The letter stated that each of respondent's officers declined to sign or file, or to authorize the signing or filing of, forms 18-51 and 18-51a in the exercise of his Fifth Amendment privilege not to be a witness against himself. The letter further stated that the officers had adopted this means of asserting the privilege because a claim of privilege made in the name of an officer would tend to incriminate him and might constitute a waiver of his privilege. In addition, the letter stated it to be the conviction of respondent and its officers that respondent is not a Communist action organization. (J.A. 70-71.)

On November 17, 1961, the Assistant Attorney General, Internal Security Division, sent respondent a telegram, received the same day, denying the claims of privilege made in respondent's letter and rejecting the letter as full or partial compliance with the registration requirements of the Act. (J.A. 70, 72).

The indictment of respondent followed on December 1, 1961.

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[2] Section 7(a) requires an organization to register within 30 days after an order requiring it to do so becomes final. A registration order becomes final 10 days after the issuance of the Court's mandate upon affirmance of the order. (Sec. 13(b).) The mandate in the *Party* case issued October 10, 1961, following denial of a rehearing. See 368 U.S. 871.

[3] Section 11.10(b) of the regulations requires communications respecting registration to be addressed to him.

Argument

The decision below does not foreclose the conviction of respondent for failure to register under the Act, but gives the government the option of a new trial (Pet. 31-32). Nevertheless, the petition complains (p. 6) that the decision "interferes with the operation" of the Act by the ruling that the prosecution has the burden of proving the existence of a person who was willing to sign and submit the registration documents (forms 18-51 and 18-53a) on respondent's behalf. But the government does not assert that the proof required of it by the court below is unavailable. Nor is there any showing that compliance with the requirement would be unduly burdensome. Thus the government's complaint rests on nothing but its *ipse dixit*.

The government also complains (Pet. 7) that enforcement proceedings against respondent have been pending for fourteen years and that, by requiring a new trial, "the decision below will delay the application of the Act to the Communist Party for several additional years." The prior delay resulted from Board errors that twice required remanding the proceedings to it. *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115; *Communist Party* v. *Subversive Activities Control Board*, 254 F. 2d 314. If, as the court below unanimously held, the government is once more in error, a grant of certiorari will simply prolong the delay which the error has already occasioned.

Moreover, the decision below is clearly in accord with the decision in the *Party* case and other relevant decisions of this Court, and a reversal of the conviction was also required on grounds which were briefed but not reached below.

The decision below rests on two holdings, one for each of the alternative methods by which registration documents can be executed under the regulations of the Attorney General. We will show that both holdings are clearly right.

1. Self-incrimination of respondent's officers under the first method of executing the registration documents.

The court below held that respondent's officers were entitled to the privilege, which they had claimed under the Fifth Amendment, not to sign the registration documents as officers, in accordance with the first method prescribed by the regulations. The government disputes the correctness of this holding. It does not, however, dispute the ruling below (Pet. 27-28) that, "Since the officers could not identify themselves in claiming the privilege without surrendering its protection * * * the November 10 letter was a sufficient assertion of their claim." Nor does the government dispute the further ruling below (Pet. 28) that if respondent's officers were privileged not to sign the registration documents "no liability attached to the Party by reason of their refusal."

Clearly, any officer of respondent who executed the registration documents as an officer would incriminate himself in two ways. First, by signing his name and stating his title, he would disclose that he is an officer of the Communist Party, thereby admitting an incriminating fact. *Blau v. United States*, 340 U. S. 159; *Scales v. United States*, 367 U. S. 203.

Second, the officer would incriminate himself by supplying the information called for by the registration documents. The registration statement requires the names and addresses of respondent's officers, members and contributors, the amount and purposes of its expenditures, and the number and location of its printing and duplicating equipment (J.A. 60-63). Each of these items could provide the Attorney General with evidence or leads for a prosecution of the officer under section 4(a) of the Act for conspiring "to perform any act which would substantially contribute to the establishment within the United States of a totali-

tarian dictatorship" under foreign control. It could also supply evidence for use in a prosecution of the officer under the advocacy, organizing, literature, membership and conspiracy clauses of the Smith Act. *Dennis* v. *United States*, 341 U. S. 494; *Scales* v. *United States*, *supra*.

The registration form requires an admission that respondent is a Communist-action organization (J.A. 57) which, by definition, is a participant in a Soviet-controlled conspiracy forcibly to supplant our government with a "Communist totalitarian dictatorship" subservient to the Soviet Union. Act, secs. 3(3) and 2; *Party* case, *supra*, at 55. An admission by an officer that his organization has these characteristics obviously incriminates him under section 4(a) and the Smith Act.

Accordingly, an officer cannot supply any of the information called for by the registration documents without incriminating himself.[9] Cf. *Hoffman* v. *United States*, 341 U. S. 479, 488.

Nevertheless, the government contends that the officers were not entitled to the privilege on two grounds.

(a) It is first argued that an officer of an organization, by accepting office, relinquishes his privilege with respect to any governmental inquiry into the affairs of the organization (Pet. 12). This argument is an extravagant extension of the doctrine of *United States* v. *White*, 322 U. S. 694, that a custodian of organization records is not privileged to withhold *the records* because their *contents* might incriminate him. The registration documents, however, do not require the production of organization records. What they require is (1) that the officer make the incriminating admission of his officership, and (2) that he compile and supply incriminating information which may

[9] The only other information called for by the registration documents—respondent's name and address—was supplied by respondent, no doubt superfluously, in its letter of November 10, 1961 to the Assistant Attorney General (J.A. 70).

not, and probably does not, even appear in the organization's records.

The government's argument was made in the *Party* case. Brief for Respondent, No. 12, Oct. Term, 1960, pp. 121-125. The four Justices who reached the issue rejected the government's contention, holding that the Act's registration requirement violates the privilege of respondent's officers and is therefore invalid. Although the majority held the privilege issue premature, it is evident that they thought the *White* doctrine inapplicable. Otherwise they would have held that the officers had no privilege to claim instead of postponing decision until after the claim of a privilege which the Justices believed non-existent.

Curcio v. United States, 354 U. S. 118, holding that an officer of an organization is privileged not to reveal the whereabouts of organization records, is dispositive of the government's contention. *Curcio* concluded (at 123-25):

> "A custodian, by assuming the duties of his office, undertakes the obligation to produce the books of which he is custodian in response to a rightful exercise of the state's visitorial powers. But he cannot lawfully be compelled, in the absence of adequate immunity from prosecution, to condemn himself by his own oral testimony * * * By accepting custodianship of records he 'has voluntarily assumed a duty which overrides his claim of privilege' *only* with respect to the production of the records themselves." (Emphasis in the original.)

Similarly, *Blau*, *supra*, at. 160, n. 1, held that a grand jury witness was privileged to refuse to answer whether she was in the employ of the Communist Party, was the custodian of its books or knew their whereabouts, knew the names of its officers, or could describe the books.

As already shown, the registration requirements of the Act, like the questions in *Curcio* and *Blau*, do not involve

"production of the records themselves," but compel the officer to "condemn himself" by the equivalent of "his own oral testimony."

(b) It is argued that the privilege is not available to respondent's officers because the government surely knows or suspects the identity of at least one of them (Pet. 13). This hypothetical officer, it is said, will not be prejudiced by divulging his officership in the registration document because section 4(f) prevents the fact of his registration as an officer from being introduced in evidence against him in a criminal proceeding.

The argument is disposed of by *Counselman* v. *Hitchcock*, 142 U. S. 547, which held that a partial immunity statute like section 4(f) cannot over-ride a claim of privilege because the statute does not "afford absolute immunity against future prosecution for the offense to which the question relates" (at 586). It is frivolous to assert that this rule does not apply when the government already has knowledge of, or a lead to, the incriminating fact. How is a person to know when he may rightfully claim his privilege, if the right depends on facts outside his knowledge—*i.e.*, what the government knows or suspects about him? And in fact the Court has applied the *Counselman* rule so as to vindicate claims of privilege, despite statutes of the 4(f) type, where the government already possessed the incriminating information which it sought to elicit from the witness. See, *e. g.*, *Emspak* v. *United States*, 349 U. S. 190, 200.

Moreover, if the *Counselman* rule were subject to the exception urged by the government, it would have been up to the government to prove that this case fell within the exception by evidence that it knew, or had a lead to, the identity of respondent's officers. No such evidence was offered. The rhetorical statement (Pet. 13) that "it is incredible to suppose that there is not at least one officer of the Communist Party who is known to the government", is hardly an acceptable substitute.

Finally, the government's argument relates only to an officer's admission of his officership. Even if the argument were sound, the privilege would still protect the officers against making the incriminating admission required by form IS-51a that respondent is a Communist-action organization and from furnishing the incriminating information called for by form IS-51. This is so because section 4(f) merely bars the evidentiary use against an accused of the fact of his registration as an officer or member of respondent. It does not bar the use in evidence against an officer of any of the other contents of the registration documents which he executes.[5] Nor does the government claim that it is already in possession of, or has leads to, the information called for by form IS-51.

(c) Even if it were assumed that respondent's officers were not protected by the privilege in refusing to execute or authorize the execution of the registration documents, the decision below reversing the conviction would still have been required.

The indictment charges respondent with "wilfully and unlawfully" failing to register and file a registration statement (J.A. 2-7); the court below ruled that "wilfulness is a necessary element of the crime of failing to register" (Pet. 31, n. 16); and the government does not dispute this ruling.[6] In determining whether or not the failure of respondent, an association, was willful, it is the mental state of its officers that must be imputed to it. *United States* v. *A. P. Trucking Co.*, 358 U. S. 121, 125; *New York Central* v. *United States*, 212 U. S. 481. In view of the dissents in the *Barta* case and the decision below, it cannot be denied that the officers had at least colorable grounds for believ-

[5] The section provides: "The fact of the registration of any person under section 7 or section 8 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution * * *."

ing that the privilege which they claimed was available to them. Therefore, their refusal to execute the registration documents on the basis of their claim of privilege was not willful.[9] This conclusion is established by *United States* v. *Murdock*, 290 U. S. 389, holding that the refusal of an accused to supply information demanded by the government is not willful when made in mistaken reliance on the privilege against self-incrimination.

2. The burden of proof concerning respondent's ability to register by the alternative method.

The alternative method of executing the registration documents permits them to be signed by a person other than an officer who shows his address and certifies that he has been authorized by respondent to act for it (J.A. 58, 63). The government complains (Pet. 14-17) of the ruling below that the prosecution had the burden of proving the availability of such a "willing volunteer" to execute the registration documents.

The ruling was required, in the first place, by the fact that, as the government does not dispute, willfulness is an element of the offense of failure to register (see *supra*, p. 10), and the principle that the prosecution has the burden of proving *mens rea*, like every other element of an offense, on its affirmative case. *Heikkinen* v. *United States*, 355 U. S. 273, 276; *Quinn* v. *United States*, 349 U. S. 155, 165; *Holland* v. *United States*, 348 U. S. 121, 139; *Morissette* v. *United States*, 342 U. S. 246, 273-276.

On this point, *Heikkinen* is controlling. It involved a charge that the accused, a deportee, had willfully failed to depart the United States. The Court held that the govern-

[9] At a minimum, the issue of respondent's willfulness, in the sense of evil purpose and lack of justifiable excuse, should have been submitted to the jury. The failure of the trial judge to do so would itself have required a reversal of the conviction. See *supra*, pp. 15-16.

ment had the burden of proving that some other country was willing to receive the accused and, hence, that he could have departed as the statute required. The Court said (at 276, emphasis in the original):

> "This is a criminal case. It is therefore necessary that the prosecution adduce evidence sufficient to support a finding of guilt beyond a reasonable doubt * * *. The crucial element of the crime charged in the first count is that petitioner 'did *willfully* fail to depart from the United States' within six months from the deportation order * * *. A thorough review of the record discloses no evidence that any country was willing, in that period, to receive petitioner * * *. The evidence on Count 1 is thus insufficient to support the verdict * * *."

Heikkinen thus establishes that where performance of a statutory duty by an accused requires the cooperation of some other person or agency, the government has the burden of proving that the other person or agency was willing to cooperate before the accused can be convicted of a willful default. There, since respondent's registration required the cooperation of a "willing volunteer," the burden was on the government to prove that there was such a person.

The cases cited by the government (Pet. 14) for what it calls "the ordinary rule" (Pet. 16) are inapplicable, if only for the reason that none of them involved an offense in which willfulness is an element.[3]

Moreover, the government had the burden of proof because the "other person" method of executing the registration documents is, prima facie, an illusory alternative. In the first place, it requires at least one of respondent's

[3] *United States* v. *One "Stuttz" Bottle*, 205 F. 2d 332, and *United States* v. *12 Jars*, 102 F. Supp. 344 were forfeiture proceedings under the Food, Drug and Cosmetics Act, for which *mens rea* is required; *Simon* v. *American Tobacco Corp.*, 192 Fed. 662 involved the verification of the answer of a corporate defendant in a civil suit.

officers to relinquish the privilege which he claimed and to incriminate himself. This follows from the fact that the "other person" must certify on the registration documents that he is authorized to act for respondent. Since only respondent's officers can grant this authority, the alternative method requires at least one officer to disclose the incriminating fact of his officership to the "other person."[8] The fact that this method compels the officer to make the incriminating admission to a third person, instead of directly to the Attorney General, is irrelevant. The Fifth Amendment prohibits the government from compelling a person to make an incriminating admission to *anyone*. Moreover, the third person may communicate the incriminating information to the government, either voluntarily or under compulsion of subpoena. In addition, the alternative method requires respondent's officers to supply the information called for by the registration documents for submission to the Attorney General, and thereby to incriminate themselves. See *supra*, pp. 6-7.

Second, the alternative method of registration assumes the possibility of finding a volunteer who is willing (1) to risk self-incrimination by evidencing at least sufficient knowledge of respondent's inner workings to be able to certify that he has been duly authorized to act on its behalf; (2) to incur possible criminal liability under section 15(b) of the Act for complicity in any false statements in and omissions from the registration documents; (3) to file with the Attorney General documents whose contents can be used in evidence against him in a prosecution under the Smith Act or section 4(a), and (4) to incur both the notoriety of a public identification as the agent of respondent and the odium of informing on its members, contributors and officers.

[8] The officer is required to incriminate himself not merely to a single person but to others whom he approaches and who decline to act.

Since persons can appear as spokesmen for respondent before college audiences without incurring these consequences, the government's appeal to "common knowledge" that respondent solicits such appearances (Pet. 15-16) is irrelevant. It is even more farfetched to argue (Pet. 16) that because some lawyers are willing to defend the constitutional rights of respondent in the courts, they will also be willing to undertake the non-professional function of executing the registration documents as its agent.

An additional reason why the burden of proof cannot be placed on respondent is that, as pointed out by the court below (Pet. 39), "It is unlikely that the Party could make this proof unless someone waived his privilege and testified to his efforts on behalf of the Party in seeking a signer." The same difficulty is inherent in the government's suggestion (Pet. 16, n. 9) that respondent could produce "as witnesses persons who had refused to act for it." For each such witness would, of course, have to identify the officer who had requested him to act for respondent.

3. Grounds not reached by the court below which support its judgment.

In the court below, respondent presented seven additional grounds for reversing the conviction and one ground for vacating the sentence. None of these was reached by the court. We append a brief statement of each.

(a) Eleven counts of the indictment charge failure to file the registration form (IS-51A) which called only for respondent's name and address and the statement that it "hereby registers as a Communist-action organization." (J.A. 1-7, 57). Since respondent had supplied its name and address in the letter of November 10, 1961, to the Department of Justice (J.A. 70), its conviction on these counts was based on nothing but its refusal to characterize itself as a Communist-action organization. It has contested the validity of this characterization throughout four-

teen years of litigation, and reiterated its position in the November 10 letter. No conceivable governmental interest is served by forcing respondent to declare that the Board's finding is accurate, and to do so invades its freedom of belief. Accordingly, conviction on the first eleven counts of the indictment violates the First Amendment and due process. *West Virginia Board of Ed.* v. *Barnette*, 319 U. S. 624; *Ark-Metals Construction Co.* v. *N.L.R.B.*, 110 F. 2d 148; *Hartsell Mills Co.* v. *N.L.R.B.*, 111 F. 2d 291; *Kansas City P. & L. Co.* v. *N.L.R.B.*, 111 F. 2d 340; *Swift & Co.* v. *N.L.R.B.*, 106 F. 2d 87; *N.L.R.B.* v. *Louisville Refining Co.*, 102 F. 2d 678.

(b) Respondent's conviction on count XII of the indictment was erroneous because an organization which has not registered pursuant to section 7(a) is not required to file a registration statement pursuant to section 7(d). This interpretation of the Act follows from the provision of section 7(d) that a registration under 7(a) "shall be *accompanied* by a registration statement" and from the fact that the correlative annual reporting and record-keeping requirements of 7(e) and (f) are likewise applicable only to organizations "registered under this section." At a minimum, this interpretation of section 7(d) is as plausible as the contrary, and is therefore demanded by the principle of strict construction of penal statutes. Since, as the indictment alleges (J.A. 2), respondent did not register under 7(a), a reversal of its conviction for violating 7(d) was required.

(c) The trial judge refused to charge that the term wilfully, as used in the indictment, denotes the presence of an evil purpose and the lack of a justifiable excuse (*Screws* v. *United States*, 325 U. S. 91, 101; *Heikkinen* v. *United States*, 355 U. S. 273, 279), or that respondent was not guilty if its officers believed in good faith that they had a constitutional privilege not to register and file the registration statement (J.A. 73-75). Instead, he instructed the

jury that it could return a guilty verdict if it found that respondent's failure to file the registration documents was intentional and deliberate (J.A. 42-43). The charge and refusals to charge were erroneous and require a reversal of the conviction.

(d) Sections 7 and 15 of the Act made the Board's finding that respondent is a Communist-action organization conclusive in the criminal prosecution for its failure to register and file a registration statement. As the trial court instructed the jury, the Board's determination "is binding on you and me" (J.A. 44). Thus the Act subjects respondent to punishment for failing to perform the registration obligations of a Communist-action organization, while denying it a judicial and jury trial on the issue as to whether it is such an organization.

The Act and respondent's conviction therefore violate art. III, sec. 2, cl. 3 of the Constitution and the Sixth Amendment, requiring the trial of crimes by jury, due process of law, art. III, sec. 1, vesting the judicial power in the courts, and art. 1, sec. 9, cl. 3 prohibiting bills of attainder. *United States* v. *Spector*, 343 U. S. 169, 174 *et seq.* (dissenting opinion)[9]; *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144; *Wong Wing* v. *United States*, 163 U. S. 228; Frankel, *Can the Administrative Process Evade the Sixth Amendment?* 1 Syracuse L. Rev. 173. The Act's invalidity is the more egregious because the sole constitutional justification for the registration requirements is that their application is limited to organizations having the characteristics of a Communist-action organization. See *Party* case at 88-92.

(e) Section 7(d) and the registration statement (form IS-51) violate due process because they are vague and demand information that respondent does not have the

[9] The majority did not consider this question because it had not been presented.

power to supply. Thus, form IS-51 calls for the names and aliases of respondent's members (J.A. 61-62). Determination of the identity of the members must be made in accordance with section 5 of the Communist Control Act, 50 U. S. C. 844, and *Killian* v. *United States*, 368 U. S. 231. As will appear from inspection, these criteria are not only extremely vague but turn on activities and mental attitudes which cannot possibly be known to respondent. Again, form IS-51 (J.A. 62) calls for detailed information concerning printing and duplicating devices "in the possession, custody, ownership or control" of respondent's "members, affiliates, associates or any other group or groups in which" respondent's "members have an interest." It would obviously be impossible for respondent to identify the persons and groups included in this vague and embracing description, let alone to ascertain the printing and duplicating devices in the possession of each.

Since two of the key demands of the registration statement are invalid, respondent cannot be punished for noncompliance with the remaining demands. *Boumgarn Dairy Co.* v. *United States*, 341 U. S. 214, 221; *St. Regis Paper Co.* v. *United States*, 368 U. S. 208, 224.

(f) The trial court denied an adequate *voir dire* examination of prospective jurors. It erroneously rejected questions designed to ascertain if the jurors were prejudiced against respondent or had formed any opinion as to guilt or innocence, thereby precluding determination of conventional causes for disqualification of jurors. It also erroneously rejected other questions seeking to explore the existence of experience and connections which could reasonably be expected to influence the jurors' ability to render an impartial verdict. (J.A. 21-27.) These rulings interfered with respondent's constitutional right to an impartial jury. *Morford* v. *United States*, 339 U. S. 258; *Aldridge* v. *United States*, 283 U. S. 308; *United States* v. *Burr*, Fed. Cas. No. 14,692g, p. 50; *Dennis* v. *United States*, 339 U. S. 162, 171-72; *Reynolds* v. *United States*, 8 Otto 145, 155.

(g) Respondent moved to dismiss the indictment because of the presence on the grand jury of thirteen government employees, some in sensitive agencies, and two retired government employees. Respondent also moved for a hearing on the qualifications of the grand jurors. It filed a supporting affidavit and an offer of proof stating, in substance, that because of the government's official policy of antagonism to Communism and the Communist Party and the conditioning of federal employees, the latter, as a class, have been psychologically disabled from disagreeing with the prosecutor's accusations of respondent. The District Court denied the motions. (J.A. 8-17.) The denial of the motions violated the Fifth Amendment requirement of "a legally constituted and unbiased grand jury." See *Costello* v. *United States*, 350 U. S. 359, 363; *Lawn* v. *United States*, 355 U. S. 339, 349.

(h) The sentence imposing the maximum statutory penalty of $10,000 on each count (J.A. 76) violates the prohibition of the Eighth Amendment against the imposition of "excessive fines." This is true, first, because counts I through XI charge what realistically is but one offense—resistance to registering. Cf. the statement of Justice Field, dissenting, in *O'Neil* v. *Vermont*, 144 U. S. 323, 340, endorsed in *Weems* v. *United States*, 217 U. S. 349, 371. Second, this is a test case which respondent could precipitate only by violating the Act after a vain attempt to secure an adjudication of the privilege issue in the *Party* case. Under these circumstances, imposition of the daily cumulative penalty violates due process as well as the Eighth Amendment. Cf. *Ex Parte Young*, 209 U. S. 123; *Gulf, C. & S. F. Co.* v. *Texas*, 246 U. S. 58, 62.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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